85408-4

NO. ~~84127-6~~

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL GENDLER,

Respondent,

v.

JOHN BATISTE, WASHINGTON STATE PATROL CHIEF &
WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Petitioners.

RESPONDENT GENDLER'S SUPPLEMENTAL BRIEF

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INTRODUCTION

Mickey Gendler was seriously injured when the front wheel of his bicycle jammed in a gap on Seattle's Montlake Bridge. He sought police accident reports for similar bridge incidents from the Washington State Patrol, which referred him to the Department of Transportation (WSDOT). But before the State would turn over any documents to Gendler, it demanded that he sign an agreement not to use them in litigation against a governmental agency.

The State cited 23 U.S.C. § 409, a federal statute creating a limited privilege for certain "reports, surveys, schedules, lists, or data" to the extent that they are "compiled or collected for the purpose of identifying evaluating or planning the safety enhancement of potential accident sites [or] hazardous roadway conditions pursuant [to 23 U.S.C. § 152 (now § 148)]." But the United States Supreme Court has held that § 409 is "inapplicable to information compiled or collected for purposes unrelated to § 152 and held by agencies that are not pursuing § 152 objectives." ***Pierce Cnty. v. Guillen***, 537 U.S. 129, 145-46, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003). Here, the State Patrol files, tabulates and analyzes police accident reports by location for law enforcement purposes as required by RCW 46.52.060, and has done so since

1937. *See* Wash. Laws 1937, Ch. 189, § 138. While WSDOT then enters these reports into its computer system, under a Memorandum of Understanding (MOU) between WSDOT and the State Patrol the reports always remain State Patrol property.

Gendler brought suit under both the Public Records Act (PRA) and ***Guillen***'s mandate that § 409 does not make plaintiffs worse off. ***Guillen***, 537 U.S. at 146. Both the trial and appellate courts agreed with Gendler. This Court subsequently reaffirmed that even though documents may be privileged in one state agency's hands, they remain subject to public disclosure from a different state agency that has no privilege. ***Yakima Cnty. v. Yakima Herald-Republic***, 170 Wn.2d 775, 246 P.3d 768 (2011).

This Court should hold that when a state agency compiles reports for law enforcement purposes pursuant to a statute, the state may neither use a § 409 database to shield those documents from public scrutiny, nor condition their disclosure on a plaintiff waiving his right to use them in litigation. "The people insist on remaining informed so that they may maintain control over the instruments that they have created." RCW 42.56.030. Citizens have always used litigation to hold their government accountable. This Court should protect their fundamental right to do so.

ARGUMENT

A. The trial and appellate courts in this case correctly followed *Guillen* and its progeny.

The trial and appellate courts in this case correctly followed ***Guillen*** in ruling that accident reports in the hands of the State Patrol are public records subject to disclosure under our PRA. ***Guillen*** makes plain that § 409 does not privilege reports or data collected for purposes other than § 152. 537 U.S. at 145-146 (the § 409 privilege is "inapplicable to information compiled or collected for purposes unrelated to § 152 and held by agencies that are not pursuing § 152 objectives").

Indeed, Congress gave no indication that it intended § 409 to make plaintiffs worse off than they had been before § 152:

> [T]he text of § 409 evinces no intent to make plaintiffs worse off than they would have been had § 152 funding never existed. Put differently, there is no reason to interpret § 409 as prohibiting the disclosure of information compiled or collected for purposes unrelated to § 152, held by government agencies not involved in administering § 152, if, before § 152 was adopted, plaintiffs would have been free to obtain such information from those very agencies.

Id. at 146. This interpretation is consistent with the long-standing principle that courts must narrowly construe evidentiary privileges. *Id.* at 145 ("to the extent the text of the statute permits, we must construe [§ 409] narrowly").

A closely related issue – whether the trial court erred by admitting into evidence uniform accident reports obtained from a parish sheriff's office – was recently addressed in ***Goza v. Parish of W. Baton Rouge***, 21 So. 3d 320 (La. App. 2009), *cert. denied*, 130 S.Ct. 3277 (2010). Reviewing both the history of § 409 and ***Guillen***, the Louisiana Court of Appeals held that § 409 did not apply because the data was compiled and collected by law enforcement officers for statutory law enforcement purposes, not § 152 purposes:

> The Louisiana Supreme Court specifically held in ***Long*** [***v. Louisiana***, 916 So.2d 87 (La. 2005)] that "[t]he privilege afforded to state agencies in § 409 and the documents at issue must not be viewed in a vacuum; rather, inquiry should be directed toward the purpose for which the documents are created." ***Long***, 916 So. 2d at 100. While the DOTD created the accident report form and trains local law enforcement officers to properly complete the form to fulfill its obligations under 23 U.S.C. § 152, the information added to the form by law enforcement is compiled and collected . . . pursuant to their statutory duty to investigate and report accidents. It is that information compiled by law enforcement pursuant to its statutory duty that the DOTD seeks to exclude in this matter.

Goza, 21 So. 3d at 327-28. The court specifically rejected a claim that adopting a uniform accident-report form to make it easier for another agency to meet § 152 requirements *ipso facto* transforms law enforcement duties into § 152 purposes (*Id.* at 328):

> To the extent that law enforcement accommodates the DOTD by adopting the uniform accident report forms designed by the DOTD for use in accident investigation, such action alone is insufficient to transform the normal accident investigation duties of local law enforcement agencies into an act of "information compilation and collection for § 152 purposes."

The ***Goza*** court therefore concluded that reports in the possession of a sheriff's office were not compiled or collected for § 152 purposes. 21 So. 3d at 326-328.

Like in both ***Goza*** and ***Guillen***, it is undisputed in this case that the State Patrol collects accident reports for purposes that have nothing to do with § 152. The State Patrol has been charged with responsibility for collecting accident reports since 1937. It obviously collects these accident reports for purposes unrelated to § 152, since § 152 was not enacted until 1973, and the State Patrol had already been collecting them for some 36 years before § 152 existed. Interpreting § 409 as the State does not only ignores ***Guillen***'s express holdings, but is contrary to its recognition that evidentiary privileges must be narrowly construed.

Guillen is straightforward and controlling. The reports compiled by the State Patrol for law enforcement purposes are not subject to the § 409 privilege. This Court should affirm the trial and appellate courts' correct decisions.

B. The State Patrol's demand that Gendler waive his rights violates Washington law and public policy.

The State Patrol's demand that Gendler waive his right to use public documents in litigation also violates Washington law and public policy. The PRA forbids this sort of discrimination among citizens who may seek out public records – those who agree not to use them in a lawsuit may receive the documents, others may not. The Court should affirm for this independently sufficient reason.

Under the PRA, with limited exceptions, public agencies have a duty "to make available for public inspection and copying all public records." RCW 42.56.070(1); *see also* RCW 42.56.080. Agencies specifically "shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request," except under very limited circumstances not applicable here. RCW 42.56.080. In short, the State may not discriminate against certain citizens simply because they might bring a lawsuit – it may not even ask.

Despite these clear PRA provisions, the State insists that anyone seeking an accident history must first sign a joint State Patrol/WSDOT form containing a promise that accident-history

documents will not be used in litigation against the state, city or county, purporting to rely on § 409 (CP 27):

> Federal highway safety laws require the state to create this collision database for use in obtaining federal safety improvement funds. Under Section 409 of Title 23 of the United States Code, collision data is prohibited from use in any litigation against state, tribal or local government that involves the location(s) mentioned in the collision data. By checking the box below, you agree to comply with these terms – failure to do so will be grounds for denying your request.
>
> [ ] I hereby affirm that I am not requesting this collision data for use in any current, pending or anticipated litigation against state, tribal or local government involving a collision at the location(s) mentioned in the data.

For 74 years the law has been clear that the State Patrol has a statutory obligation to collect these records. The Legislature imposed this duty "to file, tabulate and analyze" all accident reports (including the location) in 1937:

> SEC. 138. It shall be the duty of the chief of the Washington state patrol to file, tabulate and analyze all accident reports and to publish annually, immediately following the close of each calendar year, and monthly during the course of the calendar year, statistical information based thereon showing the number of accidents, the location, the frequency and circumstances thereof and other statistical information which may prove of assistance in determining the cause of vehicular accidents.
>
> Such accident reports and analysis or reports thereof shall be available to the directors of the departments of highways, licenses, public service or their duly authorized representatives, for further tabulation and analysis for pertinent data relating to the regulation of highway traffic,

> highway construction, vehicle operators and all other purposes, and to publish information so derived as may be deemed of publication value.

Laws 1937, Ch. 189, § 138.[1] And the State Patrol has a duty under the PRA to index these public records and provide a current index for public inspection and copying. RCW 42.56.070(3), (4), (5).

The State admits that the State Patrol collects the accident reports, that it scans the reports into a computer system, and that the "scanned report becomes the official record and the paper report is destroyed." CP 195-96. The State also admits that the State Patrol indexes the scanned reports (*id.* at 196):

> 14. The WSP indexes the scanned reports by driver's name and collision report number, among other items. The scanned reports are available to law enforcement, insurance companies, motorists, and other interested parties who must determine the legal and financial responsibility of the drivers involved in the reported collisions.

The MOU between the State Patrol and WSDOT confirms that the accident reports themselves remain "the property of WSP . . . ." CP 127, ¶2.

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[1] The Legislature has made minor changes in this statute over the years, but the text today remains close to the 1937 original. The main change in the first paragraph of the statute was a 2005 amendment that added the requirement that the accident reports include "whether any driver involved in the incident was distracted at the time of the accident. . . ."

The State excuses its failure to produce the records as required because it claims that the State Patrol is incapable of searching its own public records (CP 196-97):

> It is not possible for either the WSP or the WSDOT to generate an accurate list of collisions at a specific location using nothing other than the raw collision report. An accurate list of collisions at a specific location can only be generated after the collection of the data embedded in the PTCR, compilation of that data, and analysis of the raw collision reports that is performed by WSDOT for federal § 152 purposes.

This excuse is meritless. Several provisions of the PRA make clear that inconvenience is no excuse at all. "Agencies shall not deny a request for identifiable public records solely on the basis that the request is overbroad." RCW 42.56.080. An agency is allowed a reasonable amount of additional time "to locate and assemble the information requested . . . ." RCW 42.56.520. "Courts shall take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment to public officials or others." RCW 42.56.550(3).

Similarly, Washington courts have long recognized that compliance with the PRA may impose an administrative burden on an agency entrusted with public records. *See* ***Zink v. City of Mesa***,

140 Wn. App. 328, 337, 166 P.3d 738 (2007). Yet administrative inconvenience or difficulty does not excuse strict compliance with the Act. ***Hearst Corp. v. Hoppe***, 90 Wn.2d 123, 131-32, 580 P.2d 246 (1978); ***Zink***, 140 Wn. App. at 337.[2]

The State also asserts that it need not comply with its statutory duty to identify accident locations because it has "transferred" that responsibility to WSDOT under the MOU. BA 22-23. No authority supports the novel claim that the State Patrol may delegate its statutory responsibility to a different agency and then refuse to respond to public records requests on the ground that the data is held by a different agency. And as noted above, ***Yakima*** is to the contrary. This Court there rejected an argument (like the State's here) that records exempt from disclosure by the courts, but also held in non-judicial hands, were nonetheless protected as judicial records. 172 Wn.2d 780-81. Even if WSDOT is privileged like the courts in ***Yakima***, the State Patrol must still produce.

And even assuming *arguendo* that the State Patrol could and did delegate its responsibility to analyze accident locations

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[2] Courts have also recognized that the PRA includes a penalty provision to "discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute." ***Yousoufian v. Office of King Cnty. Exec.***, 152 Wn.2d 421, 429-430, 98 P.3d 463 (2004) (quoting ***Hearst***, 90 Wn.2d at 140).

under the MOU, the data would still be "owned" and "used" by the State Patrol for law enforcement purposes and not for § 152 purposes. *See* CP 127, ¶2 (records are "property of" State Patrol); RCW 42.56.010(2) ("Public record" "includes any writing . . . relating to . . . the performance of any governmental . . . function . . . owned [or] used . . . by any state . . . agency regardless of physical form or characteristics"). Concomitant to ***Yakima***'s holding that documents in a non-privileged agency's hands may not assume a different agency's privilege against disclosure, this Court has also held that a document not even in the requested agency's possession is a public record if that agency "used" the document at some time. ***Concerned Ratepayers Ass'n. v. Pub. Util. Dist. No. 1***, 138 Wn.2d 950, 983 P.2d 635 (1999). It thus does not matter whether WSDOT compiles State Patrol records: they remain public records owned and used by the State Patrol for law enforcement purposes, so the State Patrol must produce them.

Finally, the State claims that it is impossible for the State Patrol to identify accident records by location without using the WSDOT database. To the contrary, prior to 2003, the State Patrol was in fact searching the accident reports by city-street name, or county-road reference number. CP 305. Since 2003, it still indexes

all accident reports by street name, collision report number, name of driver/pedestrian/property owner/bicyclist/passenger, date of collision, date of birth, and the county. CP 306-07.

Both the trial and appellate courts correctly analyzed and applied the PRA in this case. The State's claims are meritless and contrary to Washington law and policy. This Court should affirm.

C. The State's RCW 42.56.080 arguments also lack merit.

In its Petition for Review (PFR), the State briefly argued for the first time that for decades prior to this Court's ruling in ***Guillen v. Pierce Cnty.***, 144 Wn.2d 696, 31 P.3d 628 (2001), *rev'd*, 537 U.S. 129 (2003), all accident reports were confidential pursuant to RCW 46.52.080. PFR 11-12. Although the State purported to "reserve" this issue in its Brief of Appellants at 27-28, this passing reference in its PFR is the first and only argument on the issue, so neither the trial nor appellate court (nor Gendler) addressed this unpreserved argument. Nor did the State raise this as an issue in its PFR. PFR 1-2. The issue is not properly before the Court, which should decline to consider it. RAP 13.7(b).

In any event, the State's argument lacks merit because the State Patrol itself provided police traffic collision reports to members of the public for decades upon request, rendering the

State's argument moot. CP 295-96. The State's only authority is an AG Opinion from its own counsel – hardly an unbiased source. And the State's claim that this Court held an "officer's report" "confidential" in ***Gooldy v. Golden Grain Trucking Co.***, 69 Wn.2d 610, 419 P.2d 582 (1966) is simply false. PFR at 12 n.5. ***Gooldy*** actually involved a defendant's report that happened to be admitted through an officer. 69 Wn.2d at 613-14.

Moreover, § .080 contains a proviso that State Patrol officers "shall disclose the names and addresses of persons reported as involved in an accident or as witnesses thereto, the vehicle license plate numbers and descriptions of vehicles involved, and the date, time and location of an accident, ***to any person who may have a proper interest therein*** ... " RCW 46.52.080 (emphasis added). And § .083 specifically provides that "[a]ll of the factual data submitted in report form by the officers . . . shall be made available upon request to the interested parties named in RCW 46.52.080." RCW 46.52.083.

Citizens like Gendler, who have suffered injuries at a given location, have "a proper interest" in obtaining information about similar incidents in that location. They are properly disclosed under the statutes. The State's argument lacks merit.

D. The Court should award Gendler fees on appeal.

The prevailing party in an action against an agency to obtain access to a public record is entitled to an award of costs and attorney fees. RCW 42.56.550(4). "Attorney fees incurred on appeal are included." ***Progressive Animal Welfare Soc'y v. Univ. of Wash.***, 125 Wn.2d 243, 271, 884 P.2d 592 (1994). The Court should award Gendler fees and costs on appeal.

CONCLUSION

For the reasons stated above, this Court should affirm the trial and appellate courts and award Gendler attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 16th day of May, 2011.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I caused to be mailed, a copy of the foregoing **RESPONDENT'S SUPPLEMENTAL BRIEF** prepaid, via U.S. mail on the 16th day of May 2011, to the following counsel of record at the following addresses:

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RCW 46.52.083

Confidentiality of reports — Availability of factual data to interested parties.

All of the factual data submitted in report form by the officers, together with the signed statements of all witnesses, except the reports signed by the drivers involved in the accident, shall be made available upon request to the interested parties named in RCW 46.52.080.

[1965 ex.s. c 119 § 4.]

RCW 42.56.070
Documents and indexes to be made public.

(1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of *subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing.

(2) For informational purposes, each agency shall publish and maintain a current list containing every law, other than those listed in this chapter, that the agency believes exempts or prohibits disclosure of specific information or records of the agency. An agency's failure to list an exemption shall not affect the efficacy of any exemption.

(3) Each local agency shall maintain and make available for public inspection and copying a current index providing identifying information as to the following records issued, adopted, or promulgated after January 1, 1973:

(a) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(b) Those statements of policy and interpretations of policy, statute, and the Constitution which have been adopted by the agency;

(c) Administrative staff manuals and instructions to staff that affect a member of the public;

(d) Planning policies and goals, and interim and final planning decisions;

(e) Factual staff reports and studies, factual consultant's reports and studies, scientific reports and studies, and any other factual information derived from tests, studies, reports, or surveys, whether conducted by public employees or others; and

(f) Correspondence, and materials referred to therein, by and with the agency relating to any regulatory, supervisory, or enforcement responsibilities of the agency, whereby the agency determines, or opines upon, or is asked to determine or opine upon, the rights of the state, the public, a subdivision of state government, or of any private party.

(4) A local agency need not maintain such an index, if to do so would be unduly burdensome, but it shall in that event:

(a) Issue and publish a formal order specifying the reasons why and the extent to which compliance would unduly burden or interfere with agency operations; and

(b) Make available for public inspection and copying all indexes maintained for agency use.

(5) Each state agency shall, by rule, establish and implement a system of indexing for the identification and location of the following records:

(a) All records issued before July 1, 1990, for which the agency has maintained an index;

(b) Final orders entered after June 30, 1990, that are issued in adjudicative proceedings as defined in RCW 34.05.010 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(c) Declaratory orders entered after June 30, 1990, that are issued pursuant to RCW 34.05.240 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(d) Interpretive statements as defined in RCW 34.05.010 that were entered after June 30, 1990; and

(e) Policy statements as defined in RCW 34.05.010 that were entered after June 30, 1990.

Rules establishing systems of indexing shall include, but not be limited to, requirements for the form and content of the index, its location and availability to the public, and the schedule for revising or updating the index. State agencies that have maintained indexes for records issued before July 1, 1990, shall continue to make such indexes available for public inspection and copying. Information in such indexes may be incorporated into indexes prepared pursuant to this subsection. State agencies may satisfy the requirements of this subsection by making available to the public indexes prepared by other parties but actually used by the agency in its operations. State agencies shall make indexes available for public inspection and copying. State agencies may charge a fee to cover the actual costs of providing individual mailed copies of indexes.

(6) A public record may be relied on, used, or cited as precedent by an agency against a party other than an agency and it may be invoked by the agency for any other purpose only if:

(a) It has been indexed in an index available to the public; or

(b) Parties affected have timely notice (actual or constructive) of the terms thereof.

(7) Each agency shall establish, maintain, and make available for public inspection and copying a statement of the actual per page cost or other costs, if any, that it charges for providing photocopies of public records and a statement of the factors and manner used to determine the actual per page cost or other costs, if any.

(a) In determining the actual per page cost for providing photocopies of public records, an agency may include all costs directly incident to copying such public records including the actual cost of the paper and the per page cost for use of agency copying equipment. In determining other actual costs for providing photocopies of public records, an agency may include all costs directly incident to shipping such public records, including the cost of postage or delivery charges and the cost of any container or envelope used.

(b) In determining the actual per page cost or other costs for providing copies of public records, an agency may not include staff salaries, benefits, or other general administrative or overhead charges, unless those costs are directly related to the actual cost of copying the public records. Staff time to copy and mail the requested public records may be included in an agency's costs.

(8) An agency need not calculate the actual per page cost or other costs it charges for providing photocopies of public records if to do so would be unduly burdensome, but in that event: The agency may not charge in excess of fifteen cents per page for photocopies of public records or for the use of agency equipment to photocopy public records and the actual postage or delivery charge and the cost of any container or envelope used to mail the public records to the requestor.

(9) This chapter shall not be construed as giving authority to any agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall not do so unless specifically authorized or directed by law: PROVIDED, HOWEVER, That lists of applicants for professional licenses and of professional licensees shall be made available to those professional associations or educational organizations recognized by their professional licensing or examination board, upon payment of a reasonable charge therefor: PROVIDED FURTHER, That such recognition may be refused only for a good cause pursuant to a hearing under the provisions of chapter 34.05 RCW, the Administrative Procedure Act.

[2005 c 274 § 284; 1997 c 409 § 601. Prior: 1995 c 397 § 11; 1995 c 341 § 1; 1992 c 139 § 3; 1989 c 175 § 36; 1987 c 403 § 3; 1975 1st ex.s. c 294 § 14; 1973 c 1 § 26 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.260.]